

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

DALE L. FOERSCHLER,

Plaintiff,

Case No.

v

Hon.

MICHIGAN ARMY NATIONAL GUARD,
DEPARTMENT OF THE ARMY AND
THE AIR FORCE, AND NATIONAL GUARD
BUREAU.

Defendants.

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COMPLAINT

Plaintiff, Dale L. Foerschler, by and through his counsel, Foster, Swift, Collins & Smith, P.C., and for his Complaint for declaratory judgment, injunctive relief, and damages against the Michigan Army National Guard, Department of the Army and Air Force, and National Guard Bureau, states as follows:

INTRODUCTION

1. This action arises as a result of Defendants' violation of the Michigan Freedom of Information Act, MCL 15.231 *et seq.*, and the federal Freedom of Information Act, 5 U.S.C § 552 by failing to respond to a FOIA request within the required time.

PARTIES

2. Plaintiff is an individual resident of Michigan and resides at 2100 Avalanche Drive, Holt, Michigan 48842.

3. Defendant Michigan Army National Guard (“MNG”) is a state agency or department and, therefore, is a “public body” under the Michigan Freedom of Information Act, MCL 15.232.

4. MNG is headquartered at 3411 Martin Luther King Boulevard in Lansing, Michigan.

5. Defendant Department of the Army and the Air Force (“DAAF”) is a military department and, therefore, is an agency under the federal Freedom of Information Act, 5 U.S.C. § 552(e).

6. Defendant National Guard Bureau (“NGB”) is a military department and, therefore, is an agency under the federal Freedom of Information Act, 5 U.S.C. § 552(e).

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

8. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) because Plaintiff resides in this district.

9. The Court has supplemental jurisdiction over Michigan Freedom of Information Act claims pursuant to 28 U.S.C. § 1367.

GENERAL ALLEGATIONS

10. On, February 14, 2019, on behalf of Plaintiff, Dale L. Foerschler, Foster Swift sent a Freedom of Information Act Request to the Michigan National Guard requesting an

opportunity to inspect and obtain copies of public records that relate to any or all e-mails, correspondence in any form, notes, reports, memorandum, and text messages created by, and set to or received by Jeffrey M. Laing, LTC, AV in regard to Dale L. Foerschler, Great Lakes Air Ventures, and Todd Cotter. ("February 14 Request") (**Exhibit 1**).

11. The February 14 Request was addressed to the Michigan National Guard, Attention: JAG, 3411 N. Martin, Luther King Jr. Blvd, Lansing, MI 48906 and sent to the email address listed on the website ng.mi.miarng.list.mbx.jag-foia@mail.mil. (**Exhibit 2**).

12. The Michigan National Guard is a state agency and, therefore, a public body under the Michigan Freedom of Information Act.

13. The Michigan National Guard did not respond to the FOIA request within five (5) business days, as required by Section 5 of the Michigan Freedom of Information Act.

14. In fact, nearly a month later, on March 12, 2019, Foster Swift sent a message following up on the February 14 Request. (**Exhibit 3**).

15. In response, by email dated March 12, 2019, Defendant MNG stated that it would follow up on the request as it "would have been sent to the state FOIA manager for processing..." (**Exhibit 3**).

16. On March 12, 2019, Foster Swift forwarded the February 14 Request to Defendant MNG as requested (**Exhibit 3**).

17. On March 25, 2019, Defendant MNG confirmed by email that the February 14 Request was presented to "state operations for processing."

18. Although the Defendant MNG ultimately produced certain "state" public records that responded to the request, the Defendant MNG did not provide any responsive documents that the Defendant MNG considered "federal" records.

19. Defendant MNG informed Plaintiff's attorney that the federal FOIA must be filed because Mr. Jeffrey M. Laing was a federal employee.

20. Defendant MNG requested that the Plaintiff file a "federal FOIA" request.

21. Despite the fact that there is no requirement in the federal FOIA or the Michigan FOIA to specifically send a "federal FOIA," Plaintiff, through his attorneys, submitted a separate "federal FOIA" request on March 25, 2019 ("March 25 Federal Request"). (Exhibit 4).

22. The March 25 Federal Request sought an opportunity to inspect and obtain copies of public records that relate to any or all e-mails, correspondence in any form, notes, reports, memorandum, and text messages created by, and set to or received by Jeffrey M. Laing, LTC, AV in regard to Dale L. Foerschler, Great Lakes Air Ventures, and Todd Cotter in the last three years.

23. By email dated March 25, 2019, the Defendant MNG stated that the March 25 Federal Request should be sent to his email address and "we will process the same on the Federal side."

24. On March 28, 2019, the Defendant DAAF acknowledged receipt of the March 25 Federal Request and assigned the case "FA-19-0004." (Exhibit 5).

25. Based on that case number, it appears that the March 25 Federal Request was only the fourth FOIA request received by Defendant DAAF in 2019.

26. The March 28, 2019, correspondence from the Defendant DAAF also stated that a fee would be required. (Exhibit 5).

27. By email dated April 4, 2019, Defendant DAAF sent a total cost estimate regarding the March 25 Federal Request. (Exhibit 6). This fee was characterized as a "baseline of expected fees."

28. The estimate was \$410 and a total of 12.5 hours of labor time (Exhibit 6).

29. The email requesting that the March 25 Federal Request be processed was “acknowledged” by the Defendant DAAF on April 8, 2019. (Exhibit 7).

30. On April 29, 2019, Plaintiff’s attorneys followed up with Defendant DAAF on the March 25 Federal Request asking when he can expect a response. (Exhibit 8).

31. On April 29, the Defendant DAAF responded by stating that Defendant DAAF has “submitted a helpdesk ticket” to the Department of Defense’s IT Department. (Exhibit 8).

32. Despite the fact the fee estimate was only for 12.5 hours, Defendant DAAF now indicated the process will take a “significant amount of time considering the time frame and detail of your request.” (Exhibit 8).

33. The April 29, 2019, email from Defendant DAAF also indicated that Defendant DAAF has obtained “notes, reports, and memorandum from Mr. Laing” and he is currently “processing” the documents. (Exhibit 8).

34. The April 29, 2019, email also indicted that he would “refer it to the National Guard Bureau JAG Office for final review.” (Exhibit 8).

35. On May 1, 2019, Plaintiff’s attorney sent a letter to the Defendant DAAF that identified the history of the March 25, 2019, FOIA request and stated that the Defendant has not provided a sufficient response under the FOIA. (Exhibit 9).

36. On May 2, 2019, the Defendant DAAF contacted Plaintiff’s attorney by letter. Pursuant to that correspondence, Defendant DAAF stated that the office “is currently processing your request and working with several outside agencies to obtain the relevant requested files.” (Exhibit 10).

37. Defendant DAAF estimated the completion date to be June 5, 2019, and stated the documents “produced” will then be forwarded to the National Guard Bureau FOIA office for review. (Exhibit 10).

38. On June 5, 2019, instead of responding to the March 25 Federal Request, the Defendant DAAF demanded that Plaintiff complete a “declaration of identification” for “further processing” of the FOIA request. (Exhibit 11).

39. On Friday, June 7, 2019, Plaintiff’s attorney forwarded the completed, requested declaration and it was declared sufficient by Defendant DAAF on June 10, 2019. (Exhibit 11).

40. Still having received no response, on June 18, 2019, Plaintiff’s attorney contacted the Defendant DAAF again regarding the status of the FOIA request. (Exhibit 12).

41. On June 18, 2019, the Department responded by email stating that he has “referred the FOIA on June 10th to the National Guard Bureau FOIA office for further processing.” He further indicated that once they “accept the referral and respond to me I will send you an official referral memorandum with additional information.” (Exhibit 12).

42. On June 27, 2019, Defendant DAAF stated that it has referred the March 25 Federal Request to the National Guard Bureau for “final adjudication” and direct response, which is now the fourth state or federal agency that has been involved with this request. (Exhibit 13).

43. The June 27, 2019, letter included a statement that “[t]his concludes our office’s processing of your request” despite the fact that Plaintiff has received no response that complies with Michigan FOIA or the federal FOIA. (Exhibit 13).

44. On July 3, 2019, the Defendant National Guard Bureau (“NGB”) FOIA Office sent correspondence to Plaintiff acknowledging receipt of the March 25 Federal Request. (Exhibit 14).

45. The July 3, 2019, correspondence indicated it had been assigned Case #FA-19-0040. (Exhibit 14).

46. Based on that case number, Plaintiff assumes it is the 40th FOIA request referred to Defendant NGB.

47. Instead of a response, the July 3, 2019 letter indicated the request had been submitted to the “complex queue” for processing and is #443 in the queue. (Exhibit 14).

48. The July 3, 2019, letter indicated that June 30, 2021, was the preliminary estimated completion date. (Exhibit 14).

49. To date, Defendants have not responded to the March 25 Federal Request within five business days as required by the Michigan FOIA and 20 business days as required by federal law.

50. To date, the Plaintiff was required to file two separate FOIA requests, which is not supported by law.

51. To date, the March 25 Federal Request was originally sent to Defendant MNG, then to the Defendant DAAF, and finally to Defendant National Guard Bureau without a response from any Defendant.

52. The Defendants have evaded their responsibility to respond to the FOIA requests by referring them to a different public body or agency.

53. Defendants cannot avoid their own obligation to respond to FOIA requests by forwarding the requests to another public body or agency.

COUNT I –FEDERAL FOIA VIOLATION

54. The Plaintiff incorporates paragraphs 1-54 by reference.

55. Plaintiff submitted the March 25 Federal Request on March 25, 2019.

56. Assuming the federal FOIA applied, the Defendants’ response was due within 20 business days as required by the federal Freedom of Information Act.

57. To date, Defendants have not responded, as required by law, to the March 25 Federal Request.

58. Between the time the March 25 Federal Request was submitted and the July 3, 2019, notice of preliminary estimated completion date, 78 business days have passed.

59. Between the time the March 25 Federal Request was submitted and the June 30, 2021, preliminary estimated completion date, 571 business days will have passed.

60. There are no exceptional circumstances that would exist to justify such a significant -- more than two years -- anticipated delay in responding to the March 25 Federal Request.

61. Defendants have not exercised due diligence with respect to responding to the March 25 Federal Request.

62. Based on information and belief, the March 25 Federal Request was only the fourth FOIA request sent to the Defendant MNG.

63. Based on information and belief, the March 25 Federal Request was only the 40th FOIA request referred to the Defendant NGB as of July 3, 2019.

64. Annualized, this does not appear to be a significant number of FOIA requests that would explain why Defendant NGB has such an alleged backlog or would need until June 30, 2021, to comply.

65. Based on information available on the Defendant NGB's website, for the fiscal year 2016 ("FY 2016"), Defendant NGB only received 137 FOIA requests. **(Exhibit 15).**

66. Of the 137 FOIA requests for FY 2016, Defendant NGB's own records demonstrate that it did not respond to a significant number of requests by the end of FY 2016. **(Exhibit 15).**

67. By the end of FY 2016, only a limited number of requests were given a full or partial document release. (**Exhibit 15**).

68. The statistics also demonstrate a total lack of due diligence for 2017. Although only a partial FOIA chart is available, Defendant NGB's own record show that it only received 148 total FOIA requests for the fiscal year 2017 ("FY 2017"). (**Exhibit 16**). As with FY 2016, Defendant NGB did not respond to a significant portion of the FY 2017 requests by the end of FY 2017.

69. With less than 150 requests annually for both FY 2016 and FY 2017, there is no basis to show that exceptional circumstances exist for not responding to the March 25 Federal Request.

70. If there are 443 requests ahead of the March 25 Federal Request, Defendant NGB will not be able to demonstrate reasonable progress in reducing the backlog or exceptional circumstances to explain the delay in responding.

71. Plaintiff has exhausted his administrative remedies.

72. Defendants have wrongfully withheld the requested records in violation of FOIA, 5 U.S.C. § 552, *et seq.*

73. Plaintiff has a right of access to the requested information under 5 U.S.C. § 552(a)(3), and there is no legal basis for Defendants' denial of such access.

74. There is exceptional need and urgency for ordering immediate release of the documents. The information is necessary to preserve the Plaintiff's right within the statute of limitations on possible claims.

COUNT II -- MICHIGAN FOIA VIOLATIONS

75. The Plaintiff incorporates paragraphs 1-75 by reference.

76. The Defendant MNG is a "public body" subject to the FOIA.

77. The Defendant MNG received the March 25 Federal Request.

78. Defendant MNG did not respond to the FOIA request by granting, denying, or granting in part and denying in part within five business days of receiving a FOIA request, as required by MCL 15.235.

79. Defendant MNG's failure to respond, as required by law, constitutes a denial of the March 25 Federal Request.

80. Plaintiff has exhausted his administrative remedies.

81. Supplemental jurisdiction is appropriate because Defendant MNG has not responded as required by the Michigan FOIA and has "referred" the March 25 Federal Request to federal agencies; therefore, the Court is asked to exercise jurisdiction over both federal agencies and State of Michigan "public bodies" in order to grant the requested relief.

WHEREFORE, Plaintiff requests that this Court:

- A. Order Defendants to disclose the requested records in their entirety and make copies available;
- B. Expedite these proceedings pursuant to 28 U.S.C. § 1657;
- C. Award costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E);
- D. Grant an injunction against further violations; and
- E. Grant such other relief as this Court deems proper under the circumstances.

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Dated: August 7, 2019

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